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Supreme Court, U.S.
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No. 95-1599

In the

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

v.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNACIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Should this Court review an interlocutory order on a motion to dismiss by a U.S. Court of Appeals recognizing federal subject matter jurisdiction under the Alien Tort Statute and the Torture Victim Protection Act over a complaint by alien women and children for mass torts of genocide, torture, war crimes, and crimes against humanity against the head of a *de facto* regime?

2. Should this Court review an interlocutory order on a motion to dismiss by a U.S. Court of Appeals recognizing personal jurisdiction over an alien personally served with process on the streets of New York City?

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COUNTERSTATEMENT OF THE CASE

Respondents are Bosnian women and children, alive and dead, survivors and victims of Petitioner's genocidal campaign to "ethnically cleanse" all non-Serbs from Bosnia-Herzegovina through war. Respondents were systematically raped and otherwise sexually tortured, forcibly impregnated, confined to rape/death camps for extermination, and brutally murdered because they are Muslim or Croatian rather than Serbian. Petitioner Radovan Karadzic designed and ordered this campaign to destroy non-Serbian peoples as such (Compl. ¶¶ 2-3, JA. 6-7)[1] in his official capacity as "President of Srpska" (Def. Stmt. ¶ 1, JA. 51), an ethnically Serbian insurgent regime he established within the territory of Bosnia-Herzegovina by killing, raping, expelling or imprisoning all civilians of other ethnicities. The genocide was, and continues to be, executed by the military forces under his command and control, and with the support and collaboration of the Serbian regime in Belgrade, Federal Republic of Yugoslavia (Serbia and Montenegro), a separate state. (Compl. ¶¶ 2, 18, 27, JA. 6-7, 12, 15.)

Respondents sued in the United States District Court for the Southern District of New York in March 1993, under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") and the Torture Victim Protection Act, 106 Stat. 73, *printed at* 28 U.S.C. § 1350 ("TVPA") for mass torts based on their sex and ethnicity, including rape, forced pregnancy, enforced prostitution, and extrajudicial killing in violation of statutes of the United States and the laws of nations against genocide, crimes against humanity, and the humanitarian laws of war. (Compl. ¶¶ 1-3, JA. 6-7.) Respondents sought an injunction and damages. (Compl., JA. 24.) Process was served pursuant to court order by U.S. marshals and special agents of the U.S. Department of State guarding Karadzic, *Kadic* v. *Karadzic*, No. 93 Civ. 1163 (S.D.N.Y. Mar. 3, 1994) (JA. 34-35), off

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1/ References to "Pet. __" are to Karadzic's Petition for a Writ of *Certiorari*. References to "JA. __" are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

United Nations premises, while Petitioner was physically present in New York City.[2]

On Karadzic's motion to dismiss, principally asserting lack of personal jurisdiction based on alleged imputed immunities, the district court dismissed Respondents' complaint on grounds of lack of subject matter jurisdiction *sua sponte*. *Kadic* v. *Karadzic*, 866 F. Supp. 734, 744 (S.D.N.Y. 1994) (Pet. A-65). The district court noted preliminarily that, because Petitioner may in future head a state, exercise of subject matter jurisdiction was ill-advised because the case would become nonjusticiable and an opinion in it advisory. *Id.* at 737-38 (Pet. A-51-52). That court then deemed Karadzic a "private individual[]," unreachable by the law of nations. *Id.* at 742 (Pet. A-62). Claims for torture—claims the court deemed limited to official acts of a recognized state—were dismissed because "Karadzic does not act with the authority of any foreign nation." *Id.* (Pet. A-61). Without discussing plaintiffs' other claims, the district court dismissed all claims for lack of subject matter jurisdiction. *Id.* at 744 (Pet. A-65). Respondents appealed.

Reversing, the Court of Appeals for the Second Circuit held that federal subject matter jurisdiction exists under the ATS and the TVPA under these circumstances, "that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor," *Kadic* v. *Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995) (Pet. A-5), including for torture under TVPA standards, and that he was not immune from Respondents' service of process due to his status as a U.N. invitee or under a claimed federal common law immunity. *Id.* at 236, 246-47 (Pet. A-5, 28, 30). The Second Circuit further found the case justiciable, raising no political questions, relying in part on the Statement of Interest of the United States, which expressly stated that this litigation raised no political question (U.S. Statement of Interest at 3 (lodged as Exhibit A to *Doe* Respondents' Opposition)), and should be allowed to proceed.

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[2] Karadzic does not contest the sufficiency of plaintiffs' service of process.

Kadic, 70 F.3d at 248-50 (Pet. A-35-39). The court also found no alternate forum and remanded for further proceedings. *Id.* at 250 (Pet. A-39-40).

Following the return of the mandate, the district court set a date for Petitioner to answer (that date is May 22, 1996) and rejected his attempt to stay discovery pending the disposition of his application for a writ of *certiorari*. *Doe I* v. *Karadzic*, Nos. 93 Civ. 0878, 93 Civ. 1163, 1996 WL 194298, at *2 (S.D.N.Y. Apr. 22, 1996). After Respondents moved the district court to set a date for Petitioner to answer, over three years since the complaint was filed, Karadzic petitioned this Court for *certiorari* review.

REASONS FOR DENYING THE WRIT

I. *Certiorari* Review is Inappropriate and Premature

A. The District Court has Alternative Grounds for Jurisdiction

Petitioner seeks to dismiss this action principally on the ground that the Court lacks subject matter jurisdiction under the ATS. Wholly apart from the arguments advanced in the balance of this brief addressing this and other issues, a dispositive ground for denial of the writ exists in Respondents' claims for subject matter jurisdiction under the TVPA. Respondents have alleged facts that are entirely sufficient to state a claim under the TVPA; Petitioner does not challenge their legal sufficiency. The TVPA is a federal statute for violation of which federal subject matter jurisdiction exists under 28 U.S.C. § 1331. Jurisdiction over Respondents' other claims arising from the same set of operative facts is proper under the doctrines of supplemental jurisdiction. 28 U.S.C. § 1367.

Even if this Court were to grant review, it could not hold for Petitioner in the current posture of the case because this dispositive legal question is predicated on facts as to which Respondents' pleadings must be taken as true. 2A James W. Moore et al., *Moore's Federal Practice* ¶ 12.07 (2d ed. 1994). The

statutory language of the TVPA requires that an accused torturer act "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350. Respondents have alleged specific facts sufficient to meet this standard. (Compl. ¶¶ 9, 13-16, 27-29, JA. 9-11, 15.) To reverse the Second Circuit and grant Karadzic's motion to dismiss in the present posture of the case, this Court would have to find, on the facts as pleaded, that there are no circumstances under which Petitioner could be found to have had sufficient authority to be sued under the TVPA. This is simply impossible on the current state of the record.

There is no doubt that Respondents, in their TVPA claim, have validly asserted *a basis for* the exercise of federal subject matter jurisdiction over their claims in this case, a sufficient basis to reinstate the case below even if this Court rules for Petitioner on the issues presented. The dispositive availability of the TVPA as a ground for exercise of federal jurisdiction renders Petitioner's arguments concerning the ATS less significant.

B. The Issues Presented are Untimely and Not Ripe for Review

This petition seeks review of an interlocutory order denying a motion to dismiss. The interlocutory nature of a federal court of appeals judgment strongly affects the Court's discretionary assessment of the appropriateness of review. As Justice Scalia recently stated, "We generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of *certiorari*). The fact that a judgment below is not final—as is the case here—may "of itself alone furnish[] sufficient ground for the denial of the application [for *certiorari*.]" *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Unless the occurrence of the proceeding violates a litigant's right not to stand trial—and there is no such immunity asserted here—an order resulting in a trial does not, on that ground, become appealable as final. The fact that Karadzic is facing suit is

not itself an injury, and thus, proceeding to trial will not cause this litigant permanent harm, nor will a decision on the merits of this case be effectively irreversible on an appeal from a final judgment after trial.[3] Karadzic has not argued that the issues pressed here would be effectively unreviewable later; loss of "tourism" and "foreign investments" (Pet. 18) does not qualify as permanent harm. Moreover, Karadzic has claimed no right not to stand trial *per se*. The only immunity he asserts, that he was immune from service of process as a U.N. invitee—a substantively baseless claim—is not "effectively unreviewable" later, and thus is not immediately appealable under the collateral order doctrine. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 527 (1988) (finding extradited person's claim to immunity from service of process under extradition treaty *not* reviewable collateral order).

Karadzic asserts *forum non conveniens* as a "question presented" (Pet. ii), but he never moved the district court to dismiss on this basis. Contrary to Petitioner's false assertion (Pet. 25), Respondents *have* pleaded, in no uncertain terms, that no alternative forum in which to assert their rights is available to them in their homeland. (Compl. ¶ 31, JA. 16.) The Second Circuit appropriately observed that no more suitable forum had been identified. 70 F.3d at 250–51 (Pet. A–39). That absence of evidence has yet to be filled, except by Petitioner's pleading of facts in his Petition that are false and contrary to the record. (Pet. 26.) Since the Second Circuit decision in this case, Karadzic has taken the position in the district court that *forum non conveniens* issues have yet to be determined (*See* Petitioner's Motion Pursuant to Fed. R. Civ. P. 16 and 6(b) and accompanying Declaration of Ramsey Clark ¶¶ 3, 5), yet here he argues that these issues are ripe for review by the Supreme Court. (Pet. 26.)

Stressing the fact-sensitive nature of *forum non conveniens* determinations, courts have consistently held that the denial of a motion for dismissal under the doctrine of *forum non conveniens* is

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3/ Karadzic has exerted major effort to prolong the preliminary legal aspects of this case and has avoided confronting its factual dimensions with particular persistence, thereby prejudicing Respondents.

outside the narrow range of non-final collateral orders amenable to interlocutory review. *See, e.g., Van Cauwenberghe*, 486 U.S. at 528; *Rosenstein* v. *Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 352, 354 (6th Cir. 1985). The Second Circuit rightly rejected the suggestion of *forum non conveniens* in this case. Where a genocide is in process, as here, its targets will be unlikely to have access to justice. This issue was properly resolved by the Court of Appeals[4] and is improperly raised here.

II. No "Compelling Reasons" Have Been Advanced to Support a Writ of *Certiorari*

A. The Second Circuit Ruling Recognizing Subject Matter Jurisdiction is Fully Consistent with the Law of the Circuits

Filartiga v. *Pena-Irala*, 630 F.2d 876, 887-89 (2d Cir. 1980), holding that 28 U.S.C. § 1350 provides federal subject matter jurisdiction for aliens to sue for torts that violate customary international law, is the settled law of the circuits. Since *Filartiga*, the courts of appeals have embraced its approach virtually without exception. *See, e.g., Abebe-Jira* v. *Negewo*, 72 F.3d 844, 846-47 (11th Cir. 1996) (applying *Filartiga* approach in affirming district court exercise of subject matter jurisdiction over ATS claim); *Hilao* v. *Marcos* (*In re: Estate of Marcos, Human Rights Litigation*), 25 F.3d 1467, 1472-74 (9th Cir. 1994) ("*Hilao*") (confirming that international law provides a basis for subject matter jurisdiction under ATS), *cert. denied*, 115 S.Ct. 934 (1995); *Bagguley* v.

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[4] Petitioner asserts that the International Tribunal for the Former Yugoslavia ("Tribunal") has asked other countries to avoid prosecutions "that might interfere with their proceedings." (Pet. 21.) In fact, the Tribunal has a formal deferral procedure which it has invoked in requesting Bosnia-Herzegovina to send Karadzic to the Tribunal for trial rather than try him in Bosnia, should he be apprehended. *In re Request for Deferral to Competence of Tribunal in re Karadzic et. al*, 1995 Int'l Trib. for Former Yugo., Case No. IT-95-5-D (May 16). The Tribunal has made no such request regarding the current proceeding, of which it has been well aware.

O'Donnell, 953 F.2d 660, 663 (D.C. Cir. 1991) (citing *Filartiga* in holding that prisoner had failed to demonstrate violation of an international treaty), *cert. denied*, 503 U.S. 995 (1992). Indeed, the *Kadic* claims for genocide, based on non-derogable *jus cogens* norms, are even more firmly established under "the law of nations" than official torture was when *Filartiga* was decided. In its assertion of ATS subject matter jurisdiction, the Second Circuit ruling in this case is an easy application of the correct principles that produced *Filartiga*, and of *Filartiga* itself, not an extension of either.[5]

Petitioner nevertheless argues that the Second Circuit's ruling in this case poses a direct conflict, worthy of this Court's *certiorari* review, with the D.C. Circuit's *per curiam* decision in *Tel-Oren* (Pet. 9, 13-14, 15), and its decision in *Sanchez- Espinoza* v. *Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (Pet. 9), which are said to restrict the reach of the ATS to state actors. *Kadic* does not conflict with those opinions. Both leave open the possibility of suits for treaty and customary law violations against private actors, as well as suits against officials of *de facto* regimes like Karadzic, like those permitted by the Second Circuit in this case.

Sanchez-Espinoza was a suit by Nicaraguan citizens and others for redress of tortious injuries based on alleged U.S. support of the Nicaraguan "contras." Then-Judge Scalia, writing for the panel, recognized that certain "private, nongovernmental acts . . . are contrary to treaty or the law of nations . . ." but stated that the court was "aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals." 770

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[5] Moreover, a recent decision by the Eleventh Circuit demonstrates that there is simply no conflict in the circuits with respect to the actionability of such customary and *jus cogens* norms under the ATS. See *Abebe-Jira*, 72 F.3d at 844. In *Abebe-Jira*, the court held violations of *jus cogens* norms actionable in federal courts under the ATS, finding that the only opinion in conflict with its approach was Judge Bork's concurrence in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985), the concurring opinion of one judge. *Abebe-Jira*, 72 F.3d at 846.

F.2d at 206. The injuries of genocide and violations of the humanitarian laws of war alleged here, however, *are* prohibited by treaty. *See* Convention on the Prevention and Punishment of the Crime of Genocide, (Genocide Convention), Dec. 9, 1948, 78 U.N.T.S. 277; Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention No. IV), Aug. 12, 1949, 75 U.N.T.S. 287. Both treaties are ratified by the United States. Both, by their terms, prohibit harms of the kind and under the circumstances pleaded here, whether or not conducted by private individuals. *See* Genocide Convention, Article IV (persons committing enumerated acts defined as genocide shall be punished "whether they are constitutionally responsible rulers, public officials, or private individuals"); Geneva Convention No. IV, Art. 3 ("Common Article 3") (humanitarian provisions applicable to all parties engaged in internal conflicts and thus to entities other than states).[6]

By expressly leaving open the exercise of subject matter jurisdiction under ATS suits by aliens for treaty-based violations by private actors, the *Sanchez-Espinoza* ruling is consistent with a core Second Circuit holding in this case recognizing a federal forum under the ATS for claims for genocide and war crimes against Karadzic "in his private capacity. . . ." *Kadic*, 70 F.3d at 236 (Pet. A-5). There is thus no circuit conflict on the dispositive issue of this petition: whether *a basis exists* for exercise of federal subject matter jurisdiction over Respondents' claims.

On the larger jurisdictional issues under the ATS posed by petitioner, there is also no "'real and embarrassing conflict of opinion and authority between the circuit courts of appeal,'" *Powell* v. *Nevada*, 114 S. Ct. 1280, 1285 (1994) (Thomas, J., dissenting) (quoting *Layne & Bowler Co.* v. *Western Well Works, Inc.*, 261

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[6] The Genocide Convention was not before the Court in *Sanchez-Espinoza*. The Geneva Conventions were among many provisions before the district court but were not prominent on review and are not mentioned in the D.C. Circuit opinion, the lower court having dismissed political question grounds. *Sanchez-Espinoza* v. *Reagan*, 568 F. Supp. 596 (D. D.C. 1983).

U.S. 387, 393 (1923)). The D.C. Circuit in *Sanchez-Espinoza* expressly noted that its decision did not conflict with *Filartiga*, but rejected ATS jurisdiction for the violations of the law of nations claimed by plaintiffs in that case on the grounds that it "also does not reach private non-state conduct *of this sort* for the reasons stated by Judge Edwards' opinion in *Tel-Oren*." *Sanchez-Espinoza*, 770 F.2d at 206-07 & n.5 (emphasis added). The plaintiffs in *Tel-Oren* sought relief for unofficial acts of terrorism in peacetime. The court did not view the prohibitions on terrorism as *jus cogens*, nor were the PLO or the contras said to constitute a state-in-fact. *Tel-Oren*, 726 F.2d at 795-96 (Edwards, J., concurring) (finding that terrorism is not a violation of the law of nations). No official nexus was found between the PLO and any recognized state. The TVPA was not available as an independent, sufficient basis for exercise of federal subject matter jurisdiction in either *Sanchez-Espinoza* or *Tel-Oren*.[7]

Supporting the conclusion that no circuit conflict exists between the *Filartiga* line of cases and any circuit is the fact that this Court, under its prior lower standards for accepting review on

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[7] Petitioner argues that U.S. law should adopt the more global proposition for which he argues *Tel-Oren* and *Sanchez-Espinoza* stand: that international law can never provide ATS access against non-state actors. Judge Scalia discounted this proposition in the passage quoted above. In *Tel-Oren*, Judge Bork stood alone in this view, *Tel-Oren*, 726 F.2d at 798, Judge Robb not reaching the issue, *id.* at 803 n.8, and Judge Edwards limiting himself more closely to the law before him, rejecting Judge Bork's approach in significant respects and embracing the Second Circuit's *Filartiga* decision. *See id.* at 795 (Edwards, J., concurring). A conflict with a concurring opinion of one judge is not a conflict with a circuit. Moreover, Judge Bork's view is erroneous, as argued by plaintiffs and their *amici* below, and as recognized by the Second Circuit in *Kadic*, 70 F.3d at 239 (Pet. A-12). U.S. courts have long applied international law to nonstate actors for certain violations, such as piracy and crimes of war. *See Terrell* v. *Rankin*, 65 Ky. (2 Bush) 453 (1867) (applying law of war to acts of Confederate soldiers personally); *Adra* v. *Clift*, 195 F. Supp. 857, 862-65 (D. Md. 1961) (applying ATS to acts committed by private individual).

certiorari, has repeatedly denied the writ in ATS cases following *Tel-Oren*. *Kadic* presents nothing new. Indeed, several prior cases, including *Tel-Oren* itself, presented the question of subject matter jurisdiction for review, many of them asserting conflict among the circuits. *See, e.g., Tel-Oren*, 726 F.2d at 774; *Hilao*, 25 F.3d at 1467; *Trajano* v. *Marcos (In re Estate of Marcos Human Rights Litigation)*, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993). No prior case satisfied the lower "special and important reasons" then required to support a grant of *certiorari*. Against this background, the instant case certainly cannot be found to provide "compelling reasons" for *certiorari* after the recent "tightening of the Court's review standards." Robert L. Stern et al., *Supreme Court Rules: the 1995 Revisions*, 10 (1995).

B. The Decision Below Conforms With Relevant Supreme Court Precedent

1. No Conflict Exists with This Court's Ruling in *Amerada Hess*

Karadzic claims that the Second Circuit's ruling conflicts with this Court's decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), recognizing the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"), as the exclusive basis for federal jurisdiction over foreign states and foreign sovereigns. (Pet. 10.) The defendant in *Amerada Hess* was a recognized state. Karadzic is an individual, not a recognized state, and the sovereign of none. Respondents did not sue "Srpska," and Srpska is entitled to no deference under FSIA, as the executive branch has not recognized it. *See Klinghoffer* v. *S.N.C. Achille Lauro*, 937 F.2d 44, 48-49 (2d Cir. 1991) (deference to executive branch decisions on recognition of foreign entities). *Amerada Hess* expressly leaves room for ATS suits "with respect to defendants other than foreign states." *Amerada Hess*, 488 U.S. at 438.

The attempt to create a nonexistent conflict between *Kadic*, in which an insurgent leader of a *de facto* regime is sued, and *Amerada Hess* is an oblique way for Karadzic to claim for the first time in this litigation that he is a sovereign, entitled to

sovereign immunity under FSIA. This is both incorrect and untimely.[8]

2. The Second Circuit Ruling that No Political Question is Posed by this Case is Supported by the U.S. and Raises No Issue for Review

Petitioner mistakenly claims that this case, analogous to *Tel-Oren* v. *Libyan Arab Republic*, involves nonjusticiable political questions (Pet. 22), thus presenting a circuit conflict and a conflict with Supreme Court precedent under *Baker* v. *Carr*, 369 U.S. 186 (1962). In *Tel-Oren*, Judge Robb rejected as a task for the courts the undertaking of any "consideration of terrorism's place in the international order." *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring). Petitioner ignores the fact that no court need assess the place of genocide in the international order. It has none. Respondents are not asking this Court to take a position on acceptable levels of genocidal activity or to confront conduct on which there is no international consensus. The instant case also presents no problem identifying the individual responsible for these acts. *Cf. Tel-Oren*, 726 F.2d at 823.

The Second Circuit decision is also fully consistent with this Court's ruling in *Baker* v. *Carr*, 369 U.S. 186 (1962). The United States executive branch—in a better position than Petitioner to assess whether these proceedings interfere with foreign policy—has unambiguously stated that this proceeding raises no political question: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them." (U.S. Statement of Interest at 3 (lodged

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[8] Karadzic is unlikely ever to be a sovereign, if only because indicted war criminals like him, Indictment, Int'l Crim. Trib. for the Former Yugo. (July 24, 1995) (lodged as Exhibit B to *Doe* Respondents' Opposition) are precluded from holding office in Bosnia under the Dayton Peace Accords. Const. Bosnia and Herzegovina, Art. IX(1), Dayton Peace Accords, Annex 4 (Dec. 14, 1995).

as Exhibit A to *Doe* Respondents' Opposition)). The judgment of the United States on this score is certainly entitled to the respectful consideration that the Second Circuit gave it. *See Kadic*, 70 F.3d at 250 (Pet. A-39).[9] This case, raising no political question, clearly conforms to existing circuit and Supreme Court precedent and poses no question for review.

3. The Decision Below Applies Well-Settled Principles of Personal Jurisdiction and Does Not Conflict with the U.N. Headquarters Agreement

The Court of Appeals relied on one of the "most firmly established principles of personal jurisdiction in American tradition" in upholding the assertion of jurisdiction over Karadzic, who was personally served with process while physically present in New York City. 70 F.3d at 247 (Pet. A-29-30); *Burnham* v. *Superior Court*, 495 U.S. 604, 610 (1990). Although Karadzic fails to discuss this basic fact, he effectively concedes the point by raising a series of inapplicable immunities in an attempt to overcome the Court's jurisdiction over him, validly obtained by service of process in New York. To recognize any of his asserted immunities would require an unwarranted and drastic departure from established law.

Petitioner asks this Court to create an immunity where none exists. Persons entering a jurisdiction for the purpose of engaging in litigation can be immune from service of process,[10] but

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[9] U.S. courts have consistently recognized that not all cases involving foreign nations raise nonjusticiable political questions. *See Linder* v. *Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992); *Klinghoffer*, 937 F.2d at 49; *Tel-Oren*, 726 F.2d at 796 (Edwards, J., concurring). *See also Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964); *Abebe-Jira*, 72 F.3d at 848 (following *Linder*).

[10] Holding war criminals accountable vindicates the interest in peace that the U.S. negotiations sought. Thus, even if a parallel were to be made (continued...)

no such immunity from service of process exists for persons entering the jurisdiction for the asserted purpose of participating in United Nations functions. Petitioner asserts this immunity under "established law," citing not a single case. (Pet. 27-30.) The Court of Appeals declined for good reason Petitioner's invitation to create new law. First, the U.N. Headquarters Agreement sets forth the extent of immunities granted to U.N. personnel and, as the Court of Appeals correctly concluded, Karadzic falls within none of them. *Kadic*, 70 F.3d at 247-48 (Pet. A-31-32). Further, the United States has, in this litigation, reaffirmed its position that United Nations invitees, including Karadzic for the visit during which he was served, "enjoy no immunity from jurisdiction of the Courts of the United States." (U.S. Statement of Interest at 2-3; *see also* Habib Letter, JA. 108.) The United Nations has also taken this position on the applicable law. *In re Galvao*, 1963 U.N. Jurid. Y.B. 164 ¶ 4 (opinion of U.N. legal counsel that U.N. invitees are *not* immune from legal process outside the headquarters district); *Kadic*, 70 F.3d at 247 (Pet. A-32).[11] Where the U.N. itself expresses no need for immunity from service of process for its own

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[10](...continued)
between U.N. functions and litigation, this fact brings the present circumstances clearly within the exception to the common law immunity for service of process in litigation, where, as here, "the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is involved as to justify withholding it." *Lamb* v. *Schmitt*, 285 U.S. 222, 228 (1932). *See also Cabiri* v. *Assasie-Gyimah*, No. 94 Civ. 3566, 1996 WL 191733, at *4-5 (S.D.N.Y. Apr. 18, 1996) (denying service immunity in TVPA case where defendant served in second action while being deposed as witness in first action).

[11] The United Nations filed an *Amicus Curiae* brief on behalf of the P.L.O. in *U.S.* v. *P.L.O.*, opposing the United States' request for an injunction closing down the P.L.O.'s observer mission at the U.N., asserting, in part, that the Headquarters Agreement required the U.S. to desist. *Amicus Curiae* Brief Submitted By and On Behalf of the United Nations at 2-3, *U.S.* v. *P.L.O.*, 695 F. Supp. 1456 (S.D.N.Y. 1988). The U.N. filed no brief in support of Karadzic's claim to shelter under the Headquarters Agreement.

invitees, it would be an unwarranted intrusion into U.N. affairs to create one.

Karadzic asserts that his claim for U.N. invitee immunity is an important issue of federal law. (Pet. 30.) But, as an issue of federal law, this claimed immunity does not exist—its importance in this litigation is to him alone. This issue is classically one that is not "of importance to the public as distinguished from that of the parties," disqualifying it from *certiorari* review. *Layne & Bowler*, 261 U.S. at 393.

Karadzic distorts judicial rulings in his attempt to support the insupportable in this connection. Contrary to his representations, the district court in *U.S.* v. *P.L.O.*, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988) held that subjecting the Palestine Liberation Organization ("P.L.O.") to the jurisdiction of the federal court did not interfere with its U.N. functions. That court also explicitly found and asserted jurisdiction over the P.L.O. based, in part, on its U.N.-related activities. *Id.* at 1461. Similarly, the Second Circuit, in *Klinghoffer* v. *S.N.C. Achille Lauro Co.*, 937 F.2d 44 (2d Cir. 1991), did *not*, contrary to Petitioner's representations, create a "functional immunity for the [P.L.O.] from personal jurisdiction because of its work as an invitee of the U.N." (Pet. 29.) In applying New York's long-arm statute to the P.L.O., the court held merely that the P.L.O.'s U.N.-related activities could not be fairly construed as "doing business" in New York for purposes of long-arm jurisdiction. *Id.* at 51-52. On remand, jurisdiction was found and asserted over the P.L.O. based on its non-U.N.-related activities in New York. *Klinghoffer* v. *S.N.C. Achille Lauro*, 795 F. Supp. 112, 114-15 (S.D.N.Y. 1992).

The Second Circuit properly upheld jurisdiction over Petitioner under *Burnham*. Moreover, even if some quantum of additional contact with New York were constitutionally required—which it is not—Petitioner, although he failed to so disclose in his petition, has admitted engaging in substantial fundraising and media activities while in New York. (JA. 141-44, 178.) These non-U.N.-related activities—together with the fact that Karadzic came to the U.S. voluntarily, made three separate trips each lasting

many days, did not remain within the U.N. headquarters district, and had a U.S.-provided security detail—unquestionably show that asserting personal jurisdiction here comports with due process. *See Burnham*, 495 U.S. at 638-39 (Brennan, J., concurring). It would depart radically from existing law to hold Karadzic "immune" after he purposefully availed himself of the financial and media benefits of the New York forum, *see Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 619-20 (1992) (finding jurisdiction over Argentina based on commercial activities in New York); *A.I. Trade Finance, Inc.* v. *Petra Bank*, 989 F.2d 76, 82 (2d Cir. 1993) (finding jurisdiction over foreign bank), and after he was served with process on the public streets of New York. *Burnham*, 495 U.S. at 619.

Furthermore, profound interests support the exercise of personal jurisdiction in this case. First, Respondents are victims and survivors of Petitioner's atrocities who brought their claims under U.S. statutes designed and interpreted to provide justice to aliens under precisely these circumstances, and there is no other court in which Respondents can receive civil redress for the severe injuries they have suffered. (Compl. ¶ 31, JA. 16.) In addition, New York has a strong interest in preserving its traditional right and ability to exercise jurisdiction over those who come physically into its territory and are legally served with process while present therein. Finally, Congress, in passing the TVPA and commenting on the ATS, has recently strongly reaffirmed the nation's original interest in seeing justice done in U.S. courts for victims of international human rights violations: "The [TVPA] also sends a distinct and forceful message that the United States will not host torturers within its borders." 137 Cong. Rec. H11244, 11245 (1991) (statement of Rep. Yatron). Refusing jurisdiction where the defendant is served while present in the United States, and purposefully avails himself of its facilities, protections and benefits would grant international human rights tortfeasors, like Karadzic, the safe haven in the United States that Congress, since the dawn of the nation, has intended to withhold. *See Filartiga*, 630 F.2d at 890; 137 Cong. Rec. H11244 (1991) (statements of Reps. Yatron, Mazzoli, Broomfield); 133 Cong. Rec. S3739 (1987) (statement of Sen. Spector).

III. The Second Circuit Correctly Adjudicated All Important Issues of Law

A. Karadzic's Atrocities are Redressable Under the Alien Tort Statute and the Torture Victim Protection Act

1. Karadzic Committed the Atrocities Alleged Under Color of Law

The Second Circuit was incontestably correct in ruling that Respondents have, where required, sufficiently alleged official action. 70 F.3d at 245 (Pet. A-25-26). Petitioner never confronts Respondents' allegations that he acted under color of law. Rather he simply asserts that he was a "private actor" engaged in "purely private conduct," and thus claims his acts are unreachable under either the ATS or the TVPA. (Pet. 12.)

Congress directed courts to the jurisprudence of 42 U.S.C. § 1983 for guidance in interpreting the TVPA's requirement that the torturer must have acted "under actual or apparent authority, or color of law, of any foreign nation." S. Rep. No. 249, 102nd Cong., 2d Sess. 8 (1991); H.R. Rep. No. 367, 102nd Cong., 1st Sess. 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 89. Under this law, Karadzic's actions are analogous to those of an off-duty police officer who dons his uniform and flashes his badge, and with racial animus falsely arrests a person, then brutally rapes them and beats them to death. *See Davis* v. *Murphy*, 559 F.2d 1098, 1101 (7th Cir. 1977) (off-duty officers acted under color of law when they identified themselves as officers and carried their badges and guns). Karadzic has seized the instrumentalities of state power and proceeded under the mantle of their claimed legitimacy to effectuate his aims to create, by force of arms against non-Serbian civilians, an ethnically pure official entity. Acts under such circumstances are clearly "under color of law." *See, e.g.*, *Keller* v. *District of Columbia*, 809 F. Supp. 432, 436 (E.D. Va. 1993) (officers who purported to arrest motorist outside their jurisdiction acted under "color of law" notwithstanding lack of actual authority because stop, use of firearms and physical restraints

made possible by fact that officers were clothed with state power). Karadzic's Serbs running Srpska is like the Klan running Georgia—obviously it would be state action. *See, e.g.*, *Marsh* v. *Alabama*, 326 U.S. 501, 508 (1946) (finding that corporate owner that performed all necessary municipal functions of town acted under "color of law" when it denied access on religious basis).

The "color of law" doctrine comprehends that action may be sufficiently official to be "under color of state law" and at the same time not trigger any immunity based on that official status. *Vector Research Inc.* v. *Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698-99 (6th Cir. 1996). In *Vector Research*, the plaintiffs alleged that attorneys who opposed them in another action acted "in concert with" federal marshals when they together executed an *ex parte* order for a search, subsequently vacated as unconstitutionally overbroad. *Id.* at 698. The Sixth Circuit found that the plaintiffs had sufficiently alleged that the defendant attorneys were "federal agents or actors" in executing the *ex parte* search order, and that a claim against the attorneys had thus been stated for violation of the plaintiffs' constitutional rights. *Id.* At the same time, the Court of Appeals denied the defendant attorneys' claims for qualified immunity, reasoning that the "rationale for granting qualified immunity to public officials—that they would act decisively in their jobs for the public good without fear of being sued—did not apply with equal force to private parties acting for their own ends." *Id.* at 699 (citing *Wyatt* v. *Cole*, 504 U.S. 158, 167-68 (1992). *Vector Research* shows that state action jurisprudence comprehends the consistency in the position that acts can be official enough to be "under color of law," yet, when performed by persons who are not officials of legitimate entities, lack immunity based on such status.

2. The Second Circuit's Application of the Alien Tort Statute is Consistent with the Intent of the First Congress

With great fanfare, Petitioner offers purported historical support for his claim that the ATS was intended to apply only to state actors: a lone law review article—Joseph Modeste Sweeney,

A Tort Only in Violation of the Law of Nations, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) [hereinafter "Sweeney"]—first cited on Petitioner's motion for rehearing before the Court of Appeals and rejected as unpersuasive. *Kadic* v. *Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996) (Pet. A–43) ("Professor Sweeney's argument is . . . far from conclusive."). Professor Sweeney argues that the ATS was originally intended to be limited to tort actions under the law of prize. Sweeney, at 451. Hardly final, Professor Sweeney's article has been superseded by a more recent and more authoritative law review article showing it to be interpretively erroneous, logically flawed, and historically wrong. *See* William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 256 (1996). Professor Dodge's article reveals that the Second Circuit's interpretation of the ATS in this case is completely consistent with the intent of the First Congress. *Id.*

History refutes Professor Sweeney's argument that the term "tort" in the ATS was meant to be limited to prize cases. *Id.* at 245–48. First, the plain language of the ATS, as originally passed, conferred jurisdiction for "*all* causes where an alien sues for a tort only in violation of the law of nations and or a treaty of the United States," contradicting Professor Sweeney's historical gloss on its face. *Id.* at 232 (quoting Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added)). Second, "tort" was a familiar term at the time of the First Congress, meaning much what it means today. *Id.* at 245-46. The First Congress understood that a variety of torts outside the prize context violated the law of nations, including torts that violated safe conducts, torts against ambassadors, and torts committed during acts of piracy, all of which Blackstone identified as violations of the law of nations and all of which would typically not be committed under any state authority. *Id.* at 232–33 (citing 4 William Blackstone, Commentaries *68). Third, federal courts already had jurisdiction over capture and prize cases under their admiralty and maritime jurisdiction, rendering the ATS redundant, were it so limited. *Id.* at 246–51. *See also Amerada Hess*, 488 U.S. at 436-37 (noting that the ATS "makes no mention of prize jurisdiction . . . .."). With all

respect to the academy, a law review article does not create *certiorari* jurisdiction.

B. The Nuremberg Precedents Do Not Require State Action

Karadzic purports to find support in the Nuremberg cases for his argument that the court below erred because "private actors," including those who perpetrate a genocide, are beyond the reach of international law unless they act under color of law of a recognized state. (Pet. 13.) In so doing, he ignores Respondents' allegation, here taken as true, that Karadzic is acting under color of law of a full-fledged state—the Federal Republic of Yugoslavia. (Compl. ¶ 27, JA 15.)[12] He also misrepresents history. Individual criminal liability at Nuremberg was never confined by law to those acting "in concert with the Nazi government." (Pet. 13.)

The Nazis, who designed and executed the genocidal plan, controlled the state of Germany; the genocide was substantially committed in collaboration with that state. But state action was not a required element for the offense of war crimes.[13] Rather, a Nuremberg defendant was not permitted to use the fact that he acted "pursuant to orders of his Government" as a defense to "free

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12/ Although Respondents need no further factual support on this posture of the case, the United States, in its *amicus curiae* brief in *Prosecutor* v. *Tadic*, 35 I.L.M. 32 (Int'l Crim. Trib. for the Former Yugo. 1996) ("*Tadic*"), before the Tribunal, expressly documents the extensive cooperation and support of the Federal Republic of Yugoslavia in the Bosnian Serb campaign at issue in this case. Submission of U.S. at 29–31, *Tadic*. Dusko Tadic was indicted by the Tribunal for criminal acts, including genocide and crimes against humanity, in a concentration camp (Omarska) maintained under Karadzic's orders and control, in which some of the plaintiffs in this case were held and violated.

13/ Crimes against peace, by contrast, were deliberately limited to violations by high level state actors or prominent members of a country's economic life— *i.e.*, those who were in a position to influence state policy. 15 *Law Rep. of Trials of War Criminals* 144–46 (1949).

him from responsibility . . . ." Nuremberg Charter, Article 3, *quoted in The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946). Moreover, under Article 7 of the Charter, "[t]he official position of defendants . . . [could] not be considered as freeing them from responsibility, or mitigating punishment." *Id. See also* Lyal Sunga, *Individual Responsibility in International Law for Serious Human Rights Violations* 28-29 (1992).

Thus, the doctrine of individual liability enshrined at Nuremberg was not intended to limit the class of persons who could be liable for war crimes or crimes against humanity, and thereby immunize potential war criminals from prosecution, as Karadzic seeks to do here. It was intended instead to prevent people who *were* acting under color of law from evading prosecution for their acts on that basis. The point was, and is, not that acts are more culpable because of office, but that perpetrators cannot hide from responsibility for their acts behind the cloak of their office. *See Nuremberg Tribunal, Nazi Conspiracy and Aggression, Opinion and Judgment* (1947) (authors of acts condemned as criminal by international law "cannot shelter themselves behind their official position in order to be freed from punishment . . . ."), *quoted in Hirota* v. *MacArthur*, 338 U.S. 197, 213 (1949) (Douglas, J., concurring). Once stripped of such a shield, their responsibility for their actions was, and is, no different from individuals who never held such office to begin with—that is, they are as legally responsible for their actions as any private individual.

The cases involving German industrialists mentioned by Karadzic (Pet. 13) support this view, not his. In one leading case, for example, private industrialists charged with war crimes argued, much as Karadzic (in one of his voices) argues here, that "they were private individuals holding no public official positions and that as they did not represent the State in any capacity, they could not be criminally liable for violations of international law." *In Re Flick and Others*, U.S.M.T., Nuremberg, Germany, December 22, 1947, *reprinted in* 1947 Ann. Dig. & Rep. Pub. Int'l. L. Cases 267. The defendants thus specifically disavowed any connection with the State as an element of their defense. *Id.* at 267. The court found

> [t]he distinction . . . unsound. International law . . . binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. . . . The offender in either case is charged with personal wrong, and punishment falls on the offender in *propria persona*. The application of international law to individuals is no novelty.

Id. at 269.

But Karadzic is not like the German industrialists.[14] He planned, ordered, and executed this genocide, in part through seizing various instrumentalities of the state of Bosnia-Herzegovina, in part through operating as an arm of Belgrade. His position, in seeking to straddle the public/private line, would bar liability for genocide by public and private actors alike—that is, for everyone. In petitioner's view, a state official or person under its authority who committed genocide "under color of law" would be immune—since, he argues, "[a]s against a sovereign and persons acting under its authority tort claims for injuries occurring outside the territorial jurisdiction of the United States arising from violations of the law of nations brought in federal courts are barred by the FSIA." (Pet.

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[14] It is difficult to take seriously petitioner's assertions that he is merely akin to "Jack the Ripper," (Pet. 13) (not exactly a ringing endorsement) when he persists in interviews such as the following, which appeared on BBC "Nine O'Clock News," 2000 GMT on 21 June, 1995, in a report from Pale by John Simpson on the Bosnian Serb taking of UN hostages:

Simpson: Of course many people in Serbia, for instance, in Belgrade, thought that it was perhaps the action of individual commanders in the field, and that you hadn't necessarily given the orders yourself to take UN people hostage?

Karadzic: I always back my military commanders.

Simpson: That sounds as if it were their idea, rather than yours?

Karadzic: No, no, *we function as a state and I am the Supreme Commander in Chief*, and everything my army does I do back.

FBIS-EEU-95-120, 22 June 1995 (emphasis added).

11.) At the same time, a "private" actor—as he claims to be contrary to the pleadings and his own affidavit (Def. Stmt. ¶ 1, JA. 51)—would be exempt for failure to act under color of law. (Pet. 13.)

Throughout this litigation, Karadzic has been private when avoiding liability under international law, public when seeking immunity from it. Many of the substantive laws under which plaintiffs seek to hold him accountable, like prohibitions on genocide and the war crimes alleged, apply whether he is a private or a public actor. At the same time, as the Second Circuit saw, as leader of a *de facto* regime, he is sufficiently official to be held accountable for public torture, yet lacks the recognition and legitimacy to be a sovereign, and therefore is not even arguably immune from civil accountability. *See Kadic*, 70 F.3d at 245 (Pet. A-25).

Karadzic's argument is also contradicted by the accepted doctrine of universal jurisdiction for acts committed by *hostis humani generis*, *see Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), which he has entirely ignored. Under this doctrine, his own argument that he is a private actor merely places him, for purposes of international law, in the same category as pirates and slave traders—subject to universal civil and criminal jurisdiction as an enemy of mankind. *See Filartiga*, 630 F.2d at 890.

C. The Second Circuit Correctly Adjudicated Plaintiffs' Treaty-Based Claims

1. The Treaties Relied Upon Provide the Basis For Subject Matter Jurisdiction

Petitioner argues that the Court of Appeals erred in allowing Respondents to sue for genocide and torture because the treaties they relied upon are not self-executing and therefore cannot provide the basis for federal subject matter jurisdiction under the ATS or directly. (Pet. 12.) This argument is without merit.

To begin with, Respondents' claims for torture are covered autonomously under the TVPA. Petitioner's entire argument as to whether these treaties are self-executing is therefore academic because it does not determine the outcome of his motion to dismiss. Even if this were not the case, however, Respondents would be entitled under the ATS to a federal forum for their claims under, *inter alia*, laws against genocide and humanitarian laws of war, both as "treaties" and as "law of nations."

Prohibitions on genocide and egregious war crimes, claimed violated by plaintiffs, do not need to be executed to be accessible to plaintiffs under the circumstances alleged and argued. These provisions are part of the unquestionable, and unquestioned, law of nations for torts in violation of which the ATS, by its plain language, provides a federal forum. *Filartiga*, 630 F.2d at 887. Indeed, petitioner questions neither that the prohibition on genocide is customary law nor that customary law constitutes the "law of nations" under the ATS. He does not question the axiom that international law is the law of the United States and binds U.S. courts.

Nor does Karadzic point to a conflict among the circuits with respect to the *jus cogens* nature of the prohibition on genocide. As the International Court of Justice ruled in 1951, "the principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15, 23 (1951). All courts that have considered the issue are unanimous in considering the prohibition against genocide as one of the most fundamental known. *See, e.g., Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (citing Restatement (Third) of the Foreign Relations Law of the United States (1987) ("Restatement"), § 702 cmt. n), *cert. denied*, 507 U.S. 1017 (1993). Similarly, it is well-established that laws prohibiting rape, torture and murder of civilians during armed conflict, embodied in the Geneva Conventions, constitute "[t]he core of customary law" applicable in such conflicts. Theodor Meron, *War Crimes in Yugoslavia and the Development of*

International Law, 88 Am. J. Int'l L. 78, 79 (1994). *See also Linder*, 963 F.2d at 336 (murder and other heinous acts committed by rebels during internal armed conflict violate customary international law).

Therefore, the opinion below is consistent with other circuit decisions in relying on fundamental norms prohibiting genocide and egregious war crimes as the "law of nations" actionable under the ATS. Nor does the opinion below err in relying upon the treaties cited as evidence of the law of nations, since courts routinely rely on such provisions as evidence of and interpretive guides to the content and nature of such norms. *See, e.g.*, *Carmichael* v. *United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir. 1988); *Filartiga*, 630 F.2d at 882-84.

Furthermore, apart from their status as customary law, the normative treaty provisions relied upon by plaintiffs, such as those prohibiting genocide and requiring humanitarian treatment of civilians in armed conflicts, are arguably self-executing, because they do not enforce criminal prohibitions but instead embody an "obligation not to act, or to act only subject to limitations. . . ." Restatement § 111(3) n.5. *See also Commonwealth* v. *Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878), *quoted in id.*; *U.S.* v. *Noriega*, 808 F. Supp. 791, 797-99 & n.8 (S.D. Fla. 1992) (stating in *dicta* that normative provisions of Third Geneva Convention Relative to The Treatment of Prisoners of War are self-executing). *But see Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (Geneva Convention No. IV is not self-executing). Respondents are not seeking to convict Karadzic of a crime in the United States, or even to have the United States abide by its own obligations under the treaties. Rather, they are asking the Court to recognize that Karadzic's conduct is civilly actionable by his victims as a violation of the laws against genocide and the laws and customs of war—specifically, Common Article 3 if the conflict is found to be an internal one, or under both it and the remainder of the Geneva Convention No. IV if, as plaintiffs have pleaded and the U.N. and

the U.S. have determined, the war is an international one.[15] *See* Submission of U.S. at 7, *Tadic*. The standards set forth in these treaties clearly "prescribe a rule by which the rights of the private citizen . . . may be determined." *The Head Money Cases*, 112 U.S. 580, 598-99 (1884). The court below did not err in relying on those standards as a basis for subject matter jurisdiction under the ATS.

2. The Decision Below Is Consistent with the Treaty Implementation Acts

By arguing that the Genocide Convention Implementation Act, 18 U.S.C. § 1091 (1988), by its terms precludes plaintiffs from suing for genocidal torts under the ATS (Pet. 12), Karadzic appears to be arguing that Congress has repealed the ATS to the extent it permits civil actions against persons who engage in genocide. However, as noted above, the prohibition on genocide is firmly established as a core normative principle in the law of nations. The Genocide Convention thus manifests the universality of *jus cogens* norms prohibiting genocide; it does not create them. As a nonderogable norm *jus cogens* and as customary international law, genocide would remain civilly actionable as part of "the law of nations" under the ATS, whether or not the Genocide Convention were separately implemented.

Karadzic also fundamentally misconstrues the legal role of the implementation acts. These statutes are part of the federal *criminal* code and address only the domestic implementation of the treaties for criminal purposes. The purpose of Congress in

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15/ The International Court of Justice ("ICJ") regards Common Article 3 as expressing general principles of humanitarian law, applying not only in internal conflicts but as "constitut[ing] a minimum yardstick" for international armed conflicts as well. *Nicaragua* v. *United States*, 25 I.L.M. 1023, ¶¶ 218-20 (Int'l Ct. of Just. 1986). So does the Tribunal, which has ruled that Common Article 3 is customary international law and applies whether the instant conflict is deemed internal or international. *Tadic*, 35 I.L.M. at ¶¶ 116, 117. In his petition, Karadzic has abandoned his prior claim that the war *sub judice* is internal, not international.

implementation was to limit criminal liability for citizens and to avoid creating a new civil cause of action, not to restrict the civil liability of aliens to aliens or to limit human rights that already existed. Thus, while the Acts do not "creat[e] any substantive or procedural right . . . enforceable . . . in any civil proceeding," Torture Convention Implementation Act, 18 U.S.C. § 2340B (1994); Genocide Convention Implementation Act, 18 U.S.C. § 1092, neither do they repeal the pre-existing and continuing right to enforce such claims civilly through the ATS. *Kadic*, 70 F.3d at 242 (Pet. A-19).

Congress made this clear when it enacted the TVPA in 1992, four years after it passed the Genocide Convention Implementation Act. The legislative history of the TVPA reveals it was meant to codify the existing cause of action for official torture recognized by *Filartiga*, in light of skepticism expressed by Judge Bork in *Tel-Oren*. *Kadic*, 70 F.3d at 241 (Pet. A-15). Congress expressly declined to repeal or restrict the ATS at that time, moving in the opposite direction to "permit suits based on . . . norms [other than torture and summary execution] that already exist or may ripen in the future into rules of customary international law." *Id.* (quoting H.R. Rep. No. 367, 102nd Cong., 2d Sess., 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86).[16] For the same reason, the Torture Convention Implementation Act, 18 U.S.C. § 2340A, which limits criminal jurisdiction to torturers who are nationals of or present in the U.S., cannot be said to have repealed the TVPA by imposing similar limitations on civil jurisdiction.

Construing the Implementation Acts to the contrary would violate the fundamental principle of United States law, first

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[16] This Court's decision in *Amerada Hess*, 488 U.S. at 428, holding that the FSIA constituted a repeal of the ATS insofar as the latter statute might have provided jurisdiction over foreign states, is entirely distinguishable. The FSIA is a comprehensive statutory scheme setting forth exclusive bases for jurisdiction over foreign sovereigns in U.S. courts. The two acts at issue here create new classes of federal crimes and penalties, and as such "readily could be seen as supplementing" the ATS, which provides a basis for civil action only. *See id.* at 438.

enunciated by Chief Justice Marshall in *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 113 S. Ct. 2891, 2918 (1993) (Scalia, J., dissenting) (quoting same).[17]

Unless there is a clear and unequivocal expression of Congressional intent to supersede and abrogate the provisions of the Genocide and Torture Conventions—setting the United States against *jus cogens* and customary international law—the Acts cannot be construed to preclude the courts from granting access by aliens to the prohibitions of international law in an otherwise proper case.[18]

IV. Kadic is a Mass Tort Case, not a Political Intervention

Petitioner suggests that only political zeal and delusion could motivate this lawsuit for relief from genocidal mass rape and murder. (Pet. 19–20.) These women, he reiterates, are not Americans, and their injuries happened very far away. (Pet. 20.)

17/ As further elaborated by this Court in *Chew Heong* v. *United States*, 112 U.S. 536, 540 (1884):

> Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected.

18/ As the brief for the United States in Tadic stated, "[t]he relevant law and precedents for the offenses in question here—genocide, war crimes and crimes against humanity—clearly contemplate international *as well as national* action against the individuals responsible." Submission of U.S. at 20, *Tadic* (emphasis added).

This is itself nothing but a political argument, for which the proper audience is Congress, which has already decided—once at the founding of the Republic and once again only a few years ago—to provide aliens *so called* with the two federal causes of action invoked by Respondents. Besides Congress, Karadzic's other proper target for this argument is the universal human consensus that the extermination of a people as such violates the rules of civilization, including the emerging view that the violation of the women of a community violates that community. The courts are not his forum for these arguments.

Moreover, Petitioner misses the point that universal jurisdiction over certain human rights violations is most needed when access to judicial relief is least likely to be available domestically. Genocide provides a particularly pointed example. Wherever an ethnic group is capable of being destroyed as such, the society and its laws have failed that group to the point that no recourse will be available to its members for otherwise ordinary crimes against them like murder, assault, and rape. Almost by definition, the human rights of victims of a genocide will have to be vindicated elsewhere, at least temporarily. This is why, under the principle of universal jurisdiction, "neither the nationality of the accused or the victim(s), nor the location of the crime is significant." *Demjanjuk* v. *Petrovsky*, 776 F.2d at 582-83 ("the prosecuting nation is acting for all nations. . . ."). It is also why exhaustion of remedies is generally not required "'when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile,'" *Xuncax* v. *Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (quoting S. Rep. No. 249, 102d Cong., 1st Sess. 10 (1991)), as they are here.

The abstract sovereignty arguments that animate Karadzic's petition amount, in this setting, to suggesting that we must respect the sovereignty of other nations by allowing their genocidal war criminals to remain unaccountable when they come here, because we would not want our nationals held accountable for similar acts when they go there. That is, we should let them get away with genocide there because we want to be able to get away with genocide here. Presumably, to state this argument is to refute

it. It is also contrary to the direction of international human rights worldwide, as the Appeals Chamber of the Tribunal recently observed, in the context of virtually the same factual and legal issues posed in this case, upholding the Tribunal's exercise of subject matter jurisdiction: "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach." *Tadic*, 35 I.L.M. at ¶ 97. To reject a "humar ' ing-oriented" approach in this case, as Petitioner urges, would reduce Respondents' international human rights to a nullity in the country that is most known for respecting them.

Karadzic argues that U.S. courts will be flooded with human rights litigants if these women's human rights are permitted access to court. First, when human rights begin to apply to women is a most inappropriate point to decide that the doors of the courthouse are now to be closed, because there are so many women and so many violations of women's human rights. *See Report of the Fourth World Conference on Women*, at 95 ¶ 224, U.N. Doc. A/CONF.177/20 (prov. ed. 1995). Second, in reality, Petitioner has the floodgates argument backwards. If genocide is condoned and perpetrators like Karadzic are allowed to proceed with impunity, there will be a flood of genocides, and unremitting pressure and expense to address them.[19] If Karadzic is held accountable, decisively, others may be deterred. Third, the ATS and the TVPA have built into them far too many screening devices and limiting principles to lend any credibility to Petitioner's argument that, if his victims can sue him, international victims the world over will deluge the U.S. federal courts. Karadzic masks these devices because they do not apply to him: for example, because there is no political question here, because he is not a

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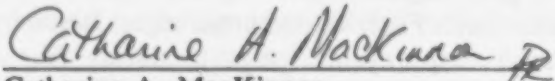
19 In one recent ruling squarely under *Kadic* for torts of genocide in Rwanda, the district court, awarding plaintiffs over $100 million, described "conduct so inhuman that it is difficult to conceive of any civil remedy which can begin to compensate the plaintiffs for their loss or adequately express society's outrage . . . ." *Mushikiwabo* v. *Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *1 (S.D.N.Y. Apr. 8, 1996). This is the kind of case in which Petitioner seeks to preclude relief altogether.

sovereign, because his acts are not acts of state, because this is a genocide, and because his is a war of war crimes. Given these limits, women's human rights and the dockets of the federal courts are equally protected in allowing this case to proceed on the merits.

CONCLUSION

For the foregoing reasons, the petition for the writ of *certiorari* should be denied.

Dated: New York, New York
May 13, 1996



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